Supreme Court, U.S.
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No. 06-498

In the

Supreme Court of the United States

ANNA McGINNIS,

Petitioner,

v.

ARCO PIPE LINE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In what appears to be a case of first impression, the issue is whether an employee handbook takes precedence over federal regulations promulgated by the U.S. Department of Transportation. More specifically, did the Court of Appeals for the Fifth Circuit and a federal district court err as a matter of law when they decided that an employer-drafted employee handbook negated the definition of "on duty" as promulgated by the U.S. Department of Transportation, with regard to a commercial driver who died in a tragic accident while driving an employer provided commercial vehicle so as to deprive the decedent's widow from collecting death benefits.

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OPINIONS BELOW

The ruling of the United States Court of Appeals for the Fifth Circuit, dated July 10, 2006, affirming the decision of the District Court.[1]

The memorandum and order of the United States District Court for the Southern District of Texas granting Respondent's motion for summary judgment and dismissing the Petitioner's complaint, dated July 26, 2005.[2]

JURISDICTION

The order of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was entered on July 10, 2006. This petition is timely under 28 U.S.C. § 1201 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the order sought to be reviewed. This court has jurisdiction to review the order of the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1254.

STATUTORY & REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are Department of Transportation regulations at 49 C.F.R. §§ 390, 395, 395.1 - 395.15, 395.2 ("DOT") and the Employee Retirement Income Security Act of 1974 at 29 U.S.C. §§ 1001-1461 ("ERISA").

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[1] App. A at 1a.

[2] App. B at 4a.

STATEMENT OF THE CASE

Petitioner's husband, Glenn McGinnis, was tragically killed while operating an Arco Pipeline ("Arco") commercial vehicle per the requirements of his job. Petitioner sued Arco under the Employee Retirement Income Security Act ("ERISA"). Petitioner sought to recover benefits she claimed were due under his work-related accidental death benefits plan ("the Plan" or "employee handbook").[3] The district court granted summary judgment in favor of Arco and against Petitioner. The Court of Appeals for the Fifth Circuit affirmed.

The Arco employee handbook states that employees are entitled to accidental death insurance "if you die as the direct result of injuries you suffer in a work-related accident that takes place on or off the Company's premises and if, at the time of the accident, you were: involved in a work-related activity, required to be present as part of your job responsibilities, or traveling on Company business."[4] There is no dispute that Mr. McGinnis died as a direct result of injuries suffered when a tree fell on the Arco vehicle he was driving. The dispute is whether Mr. McGinnis was "at work" while returning home from his reporting location, and whether the definition of "at work" will be controlled by DOT regulations, state law, or Arco's employee handbook, even though the handbook does not define the term "at work."

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[3] Although accidental death benefits are only a small part of the entire Arco employee handbook, the "Plan" or "employee handbook" as used herein refers to both the entire handbook and the specifics of the death benefits plan.

[4] Record on Appeal (ROA), p. 211.

A. FACTUAL BACKGROUND

Glenn McGinnis was a 52-year old husband, father, and full-time employee of Arco Pipeline.[5] He died tragically on June 27, 2001, when a tree fell on the roof of the Arco commercial vehicle he was driving.[6]

Mr. McGinnis' primary, but not exclusive, responsibility was to respond to and assist in the repair of mechanical equipment associated with petrochemical pipelines in Texas and Louisiana.[7] When he was not driving to specific job locations in Texas and/or Louisiana, he reported to Arco's plant in Channelview, Texas.[8] Mr. McGinnis' typical work week involved four consecutive ten-hour days. His normal working hours were 7:00 a.m. to 5:30 p.m.[9]

In an effort to reduce Mr. McGinnis' response time to job call-outs, many of which originated from his home in Porter, Texas, Arco provided Mr. McGinnis with a tool-laden, six-

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[5] ROA p. 449, Arco Pipe Line Co.'s Objections and Responses to Plaintiff's Request for Admissions and First Amended Request for Admissions ("Arco admissions"), no. 1.

[6] ROA, p. 194.

[7] ROA, p. 356, Affidavit of William Sheppard in Support of Plaintiff, Anna McGinnis' Response to Defendant Arco Pipeline Company's Response to Plaintiff's Motion for Summary Judgment ("Affidavit of William Sheppard").

[8] *Id.*

[9] ROA, p. 453.

wheeled, commercial motor vehicle[10] with a gross vehicle weight rating in excess of 10,001 pounds.[11] The vehicle held a crane mounted in the truck's bed.[12] The Arco vehicle driven by Mr. McGinnis was a commercial vehicle and not a standard consumer vehicle or "company car." For such a commercial vehicle, Mr. McGinnis was required to maintain a commercial driver's license[13] to operate the vehicle.

Arco expected Mr. McGinnis to keep this vehicle at his home, so that if he received a job call-out while at home, he could immediately proceed to the specific job location rather than first travel to his reporting location in Channelview, Texas, to retrieve the vehicle.[14] Arco also expected Mr. McGinnis to drive the Arco vehicle to and from his regular reporting location, so that if Mr. McGinnis received a call-out while on route to or from the reporting location, Mr. McGinnis could likewise proceed immediately to the specific job call-out location without having to travel first to the reporting location to retrieve the vehicle. For example, on the day following his death, and but for his death, Mr. McGinnis

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[10] Under the DOT regulations, a "Commercial motor vehicle (CMV) means a motor vehicle that has any of the following characteristics: (1) A gross vehicle weight (GVW), gross vehicle weight rating (GVWR), gross combination weight (GCW), or gross combination weight rating (GCWR) of 4,537 kilograms (10,001 pounds) or more." 49 C.F.R. 350.105 (2000).

[11] ROA, p. 356.

[12] ROA, p. 356.

[13] ROA, p. 450.

[14] ROA, p. 356.

was scheduled to drive the Arco vehicle directly to Louisiana from his home in Porter, Texas.[15]

Such an arrangement benefited Arco in two ways. First, a shortened response time for Mr. McGinnis to arrive on-site to repair Arco's mechanical equipment was necessary for the profitable operation of the pipelines. This minimized Arco's lost revenue resulting from mechanical failures affecting Arco's petrochemical operations. In other words, the sooner Mr. McGinnis arrived at the specific job location, the sooner the call-out problem could be resolved. As with all companies, time was money to Arco. Second, Mr. McGinnis earned less overtime pay because such an arrangement shortened his drive time to the location of the failed pipeline equipment.[16]

It is significant to note that Arco was subject to U.S. Department of Transportation ("DOT") regulations at the time of Mr. McGinnis' death. Arco commercial vehicle drivers, such as Mr. McGinnis, were required to comply with DOT regulations.[17] The DOT regulations are critical to the outcome of this case because the regulations included driving time as part of the definition of "on duty," which means Mr.

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[15] ROA, p. 352.

[16] If one assumes, based on driving distances readily available from the Internet, that the average commute from Porter, Texas, to Channelview, Texas, is approximately thirty (30) minutes each way, because the distance from city to city is approximately thirty (30) miles, then Arco reduces Mr. McGinnis' response time and overtime by at least an hour per call-out.

[17] ROA, p. 356.

McGinnis was at work at the time of his death and, therefore, his widow is entitled to $250,000.00 in death benefits.

B. PROCEDURAL HISTORY

As the surviving widow of Glenn McGinnis, Petitioner Anna McGinnis sought to collect the death benefits due to her for the death of her husband. Arco's employee handbook provided for $250,000.00 in death benefits "in case of death of regular full-time employees provided such death occurs as a direct result of accident at work." The handbook further provided that the benefit was due if a covered employee "dies as the direct result of injuries" suffered "in a work-related accident that takes place on or off the Company's premises" and if, at the time of the accident, the covered employee was "involved in a work-related activity, required to be present as part of [his] job responsibilities, or traveling on Company business."[18] Arco refused to pay on the basis that Mr. McGinnis was not "at work" within the meaning of the employee handbook.

Petitioner then filed suit in state district court, Montgomery County, Texas. Arco removed the case to federal court on federal question grounds. After removal, Arco moved for summary judgment on the ground that Mr. McGinnis was not "at work" at the time of his death.

The district court concluded that the definition of "on duty" as defined by the DOT should not be used to define the term "at work," even though "at work" is undefined in the Arco employee handbook, and even though "at work" is only

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[18] ROA, pp. 211-12.

one of the relevant terms[19] used in the employee handbook that addresses the issue of death benefits. The district court further concluded that Arco, as a private employer, was entitled to define the parameters of its employee handbook and to decide what is covered and what is not. The Fifth Circuit summarily affirmed, without any analysis or explanation whatsoever, stating simply that the employee handbook resolved any potential ambiguity over the term "at work." The Fifth Circuit further opined, in summary fashion, that the definition of "on duty" as promulgated by the DOT was limited to "hours-of-service regulations" and not applicable to death benefit plans.

REASONS FOR GRANTING THE PETITION

I. WHETHER THE TERMS OF AN EMPLOYEE HANDBOOK TAKE PRECEDENCE OVER FEDERAL REGULATIONS PROMULGATED BY THE U.S. DEPARTMENT OF TRANSPORTATION, SO AS TO DEPRIVE THE WIDOW OF A COMMERCIAL DRIVER, WHO WAS SUBJECT TO THOSE FEDERAL REGULATIONS, FROM RECEIVING DEATH BENEFITS.

DOT regulations are not merely wishful guidelines, but are considered to have the force of law[20] and are the heart of this case. Petitioner contends that the DOT regulations establish as a matter of law that Mr. McGinnis was on duty during the course of his trip to Porter, Texas, and, therefore,

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[19] *E.g.*, "work-related." ROA, p. 211.

[20] *See Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 556 (1999).

at work, so as to qualify for the death benefits required to be paid under the Arco Plan.

Arco contends that the DOT regulations do not apply because of the DOT's 100-mile exemption.[21] In the alternative, Arco contends that the term "at work," as set forth in the employee handbook, did not include a drive to one's home, and that such a conclusion was supported by

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[21] 49 C.F.R. § 395.1 (2000). Arco contends that the DOT regulations do not apply under the 100-mile exemption because "Porter [where Mr. McGinnis lived] is less than 100 miles from Channelview [Mr. McGinnis' Arco reporting location]". ROA, pp. 320-21. Arco's position is that if the regulations do not apply, then the definition of "on duty" under those regulations likewise does not apply.

Arco's argument is misplaced. The 100-mile exemption only reduces a driver's reporting requirements. 49 C.F.R. § 395.1(e) (2000). Under DOT regulations, a driver must complete a log of where and when he drove. 49 C.F.R. § 395.8 (2000). The excused reporting requirement did not otherwise alter the person's status as a commercial driver subject to DOT regulations. Nor did the exemption change the fact that "driving time" is included within the definition of "on duty." 49 C.F.R. § 395.2 (2000). Thus, Arco's argument as to whether Mr. McGinnis drove more or less than 100 miles is really a red herring. The reality is that the DOT regulations applied to Mr. McGinnis any time he was driving the Arco vehicle. This means that Mr. McGinnis was still on duty within the meaning of the DOT regulations when he died and, therefore, was at work. As such, Petitioner is entitled to $250,000.00 in death benefits.

either the terms of the employee handbook[22] or Texas Workers' Compensation law.[23]

The Fifth Circuit concluded that the DOT regulations did not apply because the definition of "on duty" was found in a section of the regulations related to hours-of-service and, therefore, was not applicable to death benefit plans.[24] The district court made no such finding, but instead concluded that Arco, as a private employer, was "entitled to define the parameters of the [employee handbook] and to decide what is covered and what is not."[25] The failure of the lower courts in allowing an employee handbook to take precedence over applicable DOT regulations will result in a significant negative impact on commercial drivers in all fifty states.

It is unreasonable and incongruous for the lower courts to summarily conclude that the DOT regulations do not apply merely because the definition of "on duty" is found in a portion of the regulations that discuss hours-of-service, or that an employee handbook takes precedence over DOT regulations. The reasons are several.

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[22] ROA, pp. 211-212.

[23] The relevant section of the Texas Worker's Compensation law that relates to this case is TEX. LABOR CODE ANN. § 401.011(12).

[24] App. at 3a.

[25] ROA, p. 524.

First, the regulations are intended to be broadly applied and construed.[26] More specifically, the regulations do not contain any words of limitation that would prevent their application to death benefit plans.

Second, the regulations do not modify the definitions of various terms as those terms appear from section to section. For example, given that the regulations consider all driving time of a commercial vehicle to fall within the definition of "on duty,"[27] the regulations do not eliminate or re-define driving time when considering the term "on duty" in any other sections of the regulations.

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[26] 49 C.F.R. § 390.3(a)(2000) states that "[t]he rules in subchapter B of this chapter are applicable to all employers, employees, and commercial motor vehicles, which transport property or passengers in interstate commerce."

[27] The DOT regulations state that:

> On duty time means all time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work. On duty time shall include: . . . (3) All driving time as defined in the term driving time; . . . .

"Driving time" is defined as "all time spent at the driving controls of a commercial motor vehicle in operation." 49 C.F.R. § 395.2 (2000). Mr. McGinnis was driving the Arco commercial vehicle at the time of his death and, therefore, was on duty when he died. Under any common understanding of the term "on duty," Mr. McGinnis was either "at work" or, at the very least, performing a "work-related activity."

Third, while Petitioner would agree that private employers have some latitude to define the parameters of their death benefit plans, it is against public policy to permit employers to use their benefit plans to modify or otherwise override federal regulations. Such a result empowers employers to be the law givers, rather than Congress or the federal agencies charged with carrying out the will of Congress.

Fourth, it is important that uniform standards apply to the application of federal regulations, so as to prevent different results on a state by state basis under identical facts. It is unseemly in the context of federal DOT regulations that two different commercial drivers, both of whom are subject to DOT regulations, and both of whom died while driving commercial vehicles, could be treated differently merely because of the happenstance of the states in which they died, or the employee handbooks in place at the time of their death.

The Fifth Circuit implied, and the district court concluded, that Arco can re-define its obligations under the notion that as a private employer Arco could define the parameters for payment of death benefits. Yet, even if true, a private employer cannot invoke ERISA to preempt DOT regulations. In fact, ERISA itself precludes such a result:

> Nothing in this [ERISA] subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as

provided in sections 1031 and 1137(c) of this title) or any rule or regulation issued under any such law.[28] [29]

Based on the foregoing, the lower courts' reliance on ERISA is misplaced, as ERISA must defer to the DOT regulations. In other words, a private employer cannot use an employer-drafted employee handbook to alter DOT regulations applicable to commercial drivers and the extent to which commercial drivers are on duty and, therefore, at work.[30] [31]

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[28] 29 U.S.C. § 1144(d) (2001).

[29] Sections 1031 and 1137(c) do not affect the application of this section to the case at hand. 29 USC § 1131 (*i.e.*, sec. 1031) refers to amending references in the Welfare and Pension Plan Disclosure Act [29 U.S.C. 301 *et seq.*) to reference ERISA. 29 USC § 1137 (*i.e.*, sec. 1137) applies to employees of the Department of Labor or the Department of the Treasury.

[30] In the Court's decision in *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85 (1983), which is a case concerning preemption of state law by ERISA, state agencies and officials maintained that preempting the state law would impair the administration of Title VII of the Civil Rights Act of 1964. The Court found that the blanket preemption urged by the employer appellees in *Shaw* would "impair" Title VII by "frustrat[ing] the goal of encouraging joint state/federal enforcement of [that federal measure]." *Id.* at 102. *Shaw* thus supports the view that to "impair" a law is to hinder its operation or "frustrate [a] goal" of that law.

[31] Webster's New World Dictionary of the American Language, 1984, p. 192, states that a person is on duty at one's work. If a person is off duty, then one is temporarily relieved from one's work. Since Arco and Mr. McGinnis were subject to the DOT regulations, and the definition of "on duty" included driving time,

II. WHETHER THE LOWER COURTS ERRED THAT NO GENUINE ISSUES OF MATERIAL FACT EXISTED UNDER THE ARCO BENEFITS PLAN.

Assuming, *arguendo*, that private employers can use an ERISA based employee handbook to override DOT regulations as to when a commercial driver is "at work," the Court should reverse this case on the basis that there are fact issues as to whether Mr. McGinnis' operation of the Arco vehicle, at the time of his death, constituted a "work-related activity" within the meaning of Arco's Plan.[32]

More specifically, Arco's Plan, in its entirety, clearly contemplates coverage for events that are not "at work" in the strict meaning of that term. The employee handbook provides in pertinent part that:

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then Mr. McGinnis was on duty and, therefore, at work at the time of his death.

[32] Questions of fact exist as to whether Mr. McGinnis was "at work," whether he was engaged in a work-related activity, whether he was required to be present as part of his job responsibilities–in this case, present in the Arco commercial vehicle–, and/or whether he was traveling on Arco company business at the time of his death. Although benefits are generally denied for employees while they are "commuting between [their] home and [their] regular place of work," it is still a fact question whether Mr. McGinnis was merely "commuting" or performing a work-related or other activity that is covered under the death benefits Plan. If Mr. McGinnis was performing a work-related activity, then the Plan benefits must be paid.

> Occupational accidental death insurance will pay a benefit if you die as the direct result of injuries you suffer in a work-related accident that takes place on or off the Company's premises and if, at the time of the accident, you were:
>
> - involved in a work-related activity;
> - required to be present as part of your job responsibilities; or
> - traveling on Company business.[33]

Mr. McGinnis' travel between his reporting location and his home in Porter, Texas, is clearly a work-related activity (*i.e.*, a fact issue) because it is undisputed that he was not on personal business at the time of his death and because he was expected to have the Arco vehicle at his home for potential call-outs. In order to have the vehicle at his home, he was required to drive the vehicle to his home,[34] as evidenced by the fact that on the morning following his death, Mr. McGinnis was scheduled to drive the Arco vehicle directly to Louisiana from his home in Porter, Texas.[35]

In the alternative, fact issues also exist because the terms "at work" and "work-related activity" are undefined under Arco's Plan, and vague and ambiguous. There is also a fact issue that precludes summary judgment because Petitioner provides reasonable interpretations of those terms, as discussed above, and because Arco provides different interpretations.

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[33] ROA, p. 211.

[34] ROA, p. 321.

[35] ROA, p. 352.

III. WHETHER MR. McGINNIS WAS "AT WORK" UNDER TEXAS LAW.

Although not addressed by either the Fifth Circuit or the district court, a third basis on which this Court should reverse this case is whether Mr. McGinnis was considered to be "at work" under Texas law. More specifically, Mr. McGinnis falls within the definition of "course and scope" as defined by TEX. LABOR CODE ANN. § 401.011(12), which provides in pertinent part as follows:

> "Course and scope of employment" means an activity of any kind or character that has to do with and originates in the work, business, trade or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. The term includes an activity conducted on the premises of the employer or at other locations.

It is important to note that the clause "an activity of any kind or character that has to do with . . . the work" does not, in and of itself, preclude a finding of "course and scope" while driving home. This is so because under the facts of this case, Mr. McGinnis was in a heavy duty, commercial vehicle, provided by Arco, the weight of which required Mr. McGinnis to maintain a commercial driver's license. In addition, Arco expected Mr. McGinnis to drive the commercial vehicle to his home in Porter, Texas, so as to reduce his response time on job call-outs[36] on a twenty-four (24) hour, seven (7) day a week basis. A shortened response time furthered the interests or affairs of Arco because it

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[36] ROA, pp. 352, 356.

minimized Arco's lost revenue with regard to the mechanical equipment problems Mr. McGinnis was expected to resolve, and led to less overtime pay to Mr. McGinnis.

The second sentence of § 401.011(12) provides that "[t]he term includes an activity conducted on the premises of the employer or at other locations." In other words, Mr. McGinnis need not be at his reporting location in Channelview or any other specific location in order for him to qualify for benefits. As such, Mr. McGinnis' drive falls within the scope of this sentence for the simple reason that he was expected to have the vehicle with him not only while he was at his reporting location or a site-specific location, but also while he was traveling to or returning from the reporting or a site-specific location.

In the alternative, Mr. McGinnis falls within the state law exceptions provided by § 401.011(12), and which exceptions were not addressed in the decisions of the lower courts. More specifically, the exceptions to TEX. LABOR CODE ANN. § 401.011(12), provide:

> The term [course and scope of employment] does not include:
>
> (A) transportation to and from the place of employment unless:
>
> (i) the transportation is furnished as a part of the contract of employment or is paid for by the employer;
>
> (ii) the means of the transportation are under the control of the employer; or

(iii)the employee is directed in the employee's employment to proceed from one place to another place; or

(B) travel by the employee in the furtherance of the affairs or business of the employer if the travel is also in furtherance of personal or private affairs of the employee unless:

(i) the travel to the place of occurrence of the injury would have been made even had there been no personal or private affairs of the employee to be furthered by the travel; and

(ii) the travel would not have been made had there been no affairs or business of the employer to be furthered by the travel.

Mr. McGinnis falls within the exception provided under § 401.11(12)(A)(i) because it is undisputed that Arco paid for the commercial vehicle and the expenses to operate the vehicle driven by Mr. McGinnis on the day of his death.[37]

Mr. McGinnis falls within the exception provided under § 401.11(12)(A)(ii) because it is undisputed that Arco controlled "the means of transportation" that Mr. McGinnis used on the day he died. Arco could have required Mr. McGinnis to drive his own vehicle to and from Arco's reporting location in Channelview. Yet instead, Arco provided and expected Mr. McGinnis to drive the Arco vehicle because Arco wanted Mr. McGinnis to reduce his

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[37] ROA, p. 458.

response time to job call-outs on a twenty-four (24) hour, seven (7) day a week basis.[38]

Finally, Mr. McGinnis falls within the "furtherance of the affairs or business of the employer" exception provided by § 401.011(12)(B), for the same reason that the (12)(A)(ii) exception applies: it furthered Arco's interest that Mr. McGinnis drive Arco's vehicle to his home so that Mr. McGinnis, while at home, could immediately respond to a job call-out without the necessity of first driving to Arco's reporting location in Channelview. This would reduce Arco's lost revenue with regard to the mechanical equipment problems Mr. McGinnis was expected to resolve.

CONCLUSION

Since Arco and Mr. McGinnis were subject to the DOT regulations then in force, and because the DOT regulations defined on duty as including driving time behind the controls of a motor vehicle, Mr. McGinnis was on duty and at work at the time of his death. Petitioner was, therefore, entitled to receive the death benefits set forth in Arco's employee handbook.

The Fifth Circuit erred as a matter of law when it concluded that the DOT regulations did not apply because the definition of "on duty" was found in a section of the regulations related to hours-of-service and, therefore, not applicable to death benefit plans. The district court erred when it concluded that Arco, as a private employer, was entitled to define the parameters of the employee handbook in contravention of DOT regulations.

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[38] ROA, p. 321.

The lower courts erred for the following reasons: (1) the DOT regulations are intended to be broadly applied and construed; (2) the regulations do not contain any words of limitation that would prevent their application to death benefit plans; (3) the regulations do not eliminate or re-define driving time when considering the term "on duty" in any other sections of the regulations; (4) it is against public policy to permit employers to use their benefit plans to modify or otherwise override federal regulations; (5) it is important that uniform standards apply to the application of federal regulations, so as to prevent different results on a state by state basis under identical or similar facts; and (6) a private employer cannot invoke ERISA to preempt DOT regulations, as the ERISA statute specifically prohibits such conduct.

In the event this Court concludes that the DOT regulations do not apply, then there are fact issues as to whether Mr. McGinnis was "at work" or engaged in a "work-related activity" at the time of his death. The terms "at work" and "work-related activity" are undefined terms under the Arco Plan, which means any ambiguity should be construed in Petitioner's favor. The parties disagree whether the return trip to Porter, Texas, with a commercial vehicle intended to be used on a job specific call-out the following morning, constitute: (1) a work-related activity; (2) a requirement of Mr. McGinnis' job responsibilities; or (3) travel on company business.

In the alternative, fact issues exist on whether Mr. McGinnis' operation of the Arco vehicle falls within the definition of course and scope under TEX. LABOR CODE ANN. § 401.011(12), or one of the following exceptions: (1) transportation furnished by Arco as part of McGinnis' employment, (2) the means of the transportation were under Arco's control; (3) Arco directed Mr. McGinnis to proceed

to Porter, Texas in the Arco vehicle; or (4) Mr. McGinnis' trip to Porter, Texas, furthered Arco's affairs or business.

Based on the foregoing, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-20686
Summary Calendar

[Filed July 10, 2006]

ANNA MCGINNIS Plaintiff-Appellant,	))
v.	)
ARCO PIPE LINE COMPANY; ATLANTIC RICHFIELD CO; BRITISH PETROLEUM CO; BP AMERICA INC; BP PIPE LINE CO; BP PIPELINES (NORTH AMERICA) (INC), Defendants-Appellees.	)))))))

Appeal from the United States District Court
for the Southern District of Texas
C.A. No. H-03-3105

Before HIGGINBOTHAM, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:*

Appellant's husband, Glenn McGinnis, was tragically killed on his way home from work when a pine tree fell on the roof of his car. Appellant sued Mr. McGinnis's employer, Arco Pipe Line, under the Employee Retirement Income Security Act ("ERISA"). She sought to recover benefits she claims were due under his work-related accidental death benefits plan ("the Plan"). The district court granted summary judgment in favor of Arco Pipe Line.

The parties agree that the Plan provides benefits only if the employee was "at work." The issue presented in this appeal is whether Mr. McGinnis should be considered "at work" while he was commuting home. The underlying facts are not in dispute. Whether the phrase "at work" as used in the Plan includes a commute home raises a pure question of law. Our review is *denovo*. *SeeNickel v. Estate of Estes*, 122 F.3d 294, 298 (5th Cir. 1997). We conclude that Mr. McGinnis was not "at work" at the time of his death, and we therefore affirm the grant of summary judgment against Appellant.

A benefits handbook given to employees explicitly provides, "The plan won't pay a benefit for any death that . . . occurs while you're commuting between your home and your regular place of work." In "ERISA parlance," an "employee benefits handbook [is] a 'Summary Plan Description' (SPD)." *Sunbeam-OsterCo. GroupBenefitsPlan for Salaried & Non-Bargaining Hourly Employees v.*

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* Pursuant to 5th Cir. R. 47.5, this Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Whitehurst, 102 F.3d 1368, 1370 (5th Cir. 1996). We have held that SPDs are binding. *SeeHansen v. Continental Ins.*, 940 F.2d 971, 982 (5th Cir. 1991). Therefore, assuming *arguendo* that the term "at work" is ambiguous, and that it might include a commute home, the benefits handbook resolves any ambiguity in the Plan itself. Under the benefits handbook, Mr. McGinnis was not "at work" within the meaning of the Plan.

Appellant resists this conclusion by arguing that Mr. McGinnis meets the definition of "on duty" contained within certain Department of Transportation regulations. *See* 49 C.F.R. § 395.2. Setting aside potential differences between the concepts of "at work" and "on duty," the definition of "on duty" in those regulations does not govern the Plan. The "on duty" concept is delineated for the purposes of hours-of-service regulations promulgated by the Department of Transportation, not for death benefits plans. *See generally* 49 C.F.R. § 395.

Because Mr. McGinnis was commuting home rather than "at work" when he died, the district court correctly concluded that he was not entitled to death benefits under the Plan.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-03-3105

[Filed July 26, 2005]

ANNA MCGINNIS,	)
Plaintiff,	)
	)
v.	)
	)
ARCO PIPE LINE CO.,	)
Defendant.	)
	)

MEMORANDUM AND ORDER

There are four Motions currently pending in this case: Plaintiffs' Motion and Notice To Take Judicial Notice of Adjudicative Facts and Other Matters (Docket Entry No. 20); Plaintiff's Motion and Notice of Summary Judgment (Docket Entry No. 22); Plaintiff's Motion and Notice of Motion To Compel (Docket Entry No. 23); and Defendant's Cross-Motion for Summary Judgment (Docket Entry No. 25). For the reasons that follow, Plaintiff's Motion To Take Judicial Notice of Adjudicative Facts and Other Matters (Docket Entry No. 20) is **GRANTED**; Defendant's Cross-Motion for

Summary Judgment (Docket Entry No. 25) is **GRANTED**; Plaintiff's Motion and Notice of Summary Judgment (Docket Entry No. 22) is **DENIED**; and Plaintiff's Motion and Notice of Motion To Compel (Docket Entry No. 23) is **DENIED**.

I. BACKGROUND

This case arises out of the tragic death of Plaintiff's husband. Mr. McGinnis was driving home from work in a company-owned commercial motor vehicle when a pine tree hit the roof of the vehicle and killed him. The issue in this case is whether Plaintiff's husband was "at work" at the time of his death. If he was not, Plaintiff cannot recover a Work Related Accidental Death Benefit from Defendant.[1] The benefit of $250,000 was to be paid "in case of death of regular full-time represented employees provided such death occurs as a direct result of accident at work."

According to the Occupational Accidental Death Benefit Plan, the insurance pays a benefit if a covered employee dies as the direct result of injuries suffered in a work-related accident "that takes place on or off the Company's premises" if, at the time of the accident, the employee was "involved in a work-related activity; required to be present as part of [his] job responsibilities; or traveling on Company business." However, the Plan explicitly states that it will not pay a benefit for a death that occurs while a covered employee is "commuting between [his] home and [his] regular place of work."

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[1] All other Defendants in this case have either been dismissed or were never served.

Defendant claims that drivers like Mr. McGinnis were provided with company vehicles to drive to and from work so that the vehicle would be available in the event the driver was called out on a job from his home, but that, while commuting to and from work, drivers were not considered to be performing work for the company and were not paid during that time.

Plaintiff argues that the definition of "at work" is not governed by the description of the Plan, but rather by a set of federal regulations that apply to employees and commercial motor vehicles. Those regulations define when a driver like Mr. McGinnis is considered "on duty." According to the regulations Plaintiff cites, "[o]n duty time means all time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work." "On duty time" includes "[a]ll driving time" as well as "[a]ll time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper birth." "Driving time" is defined as "all time spent at the driving controls of a commercial motor vehicle in operation." 49 C.F.R. § 395.2. Plaintiff essentially argues that the definitions of "on duty" and "driving time" under the regulations should guide this Court's interpretation of whether Plaintiff's husband was "at work" at the time of the death.

II. DISCUSSION

A. Plaintiff's Motion and Notice To Take Judicial Notice of Adjudicative Facts

In this Motion, Plaintiff asks the Court to take judicial notice of certain sections of the Texas Labor Code. Defendant

has stated that it does not object to Plaintiff's Motion. Therefore, the Motion is **GRANTED**.

B. Legal Standard for a Motion for Summary Judgment

A motion for summary judgment under Federal Rule of Civil Procedure 56 requires the Court to determine whether the moving party is entitled to judgment as a matter of law, based on the evidence thus far presented. *See* Fed. R. Civ. P. 56(c). "Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Kee v. City of Rowlett,* 247 F.3d 206, 210 (5th Cir. 2001) (citations omitted). Evidence is construed in the light most favorable to the non-moving party. *Id.* "If the moving party meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial." *Engstrom v. First Nat'l Bank of Eagle Lake, 47* F.3d 1459, 1462 (5th Cir. 1995) (citations omitted).

C. Summary Judgment Discussion

Plaintiff has failed to show why this Court should define "at work" based on the definition of "on duty" in the federal regulations she cites, as opposed to language in the description of the Plan. Defendant is a private employer who chose to provide this benefit to certain employees on top of any death benefits payable through the company's basic life (or group life), group accident, business travel accident, and employee death benefit plans. As a result, Defendant was

entitled to define the parameters of the Plan and to decide what is covered and what is not.

Therefore, Plaintiff's Motion and Notice of Summary Judgment is **DENIED** and Defendant's Cross-Motion for Summary Judgment is **GRANTED**. It is not necessary for the Court to reach the parties' other arguments.

D. Plaintiff's Motion and Notice of Motion To Compel

There is no issue of material fact in this case and Defendant is clearly entitled to summary judgment as a matter of law. None of the information that Plaintiff has requested from Defendant that Defendant has refused to produce would affect the Court's decision in this case. Therefore, the Motion To Compel is **DENIED**.

III. CONCLUSION

Plaintiff's Motion To Take Judicial Notice of Adjudicative Facts and Other Matters (Docket Entry No. 20) is **GRANTED**; Defendant's Cross-Motion for Summary Judgment (Docket Entry No. 25) is **GRANTED**; Plaintiff's Motion and Notice of Summary Judgment (Docket Entry No. 22) is **DENIED**; and Plaintiff's Motion and Notice of Motion To Compel (Docket Entry No. 23) is **DENIED**.

IT IS SO ORDERED.

SIGNED this 26th day of July, 2005.

/s/_____
KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE